Nos. 89-1714, 90-113 and 90-114

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES, INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fourth Circuits

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JOINT BRIEF FOR THE PETITIONERS CLINCHFIELD COAL COMPANY AND CONSOLIDATION COAL COMPANY

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QUESTIONS PRESENTED

These consolidated appeals seek this Court's resolution of two questions deferred in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988).

1. Does 30 U.S.C. § 902(f)(2) invalidate Department of Labor regulations allowing a coal mine operator to defend the black lung disability benefit claims of certain former coal miners on the grounds that the miners do not have black lung disease or any related disability.

2. If 30 U.S.C. § 902(f)(2) invalidates Department of Labor regulations affording mine operators a full and fair opportunity to defend black lung benefit claims, is 30 U.S.C. § 902(f)(2) itself invalid under the Due Process Clause of the Fifth Amendment to the Constitution of the United States because it requires mine operators to pay benefits to certain black lung claimants absent any valid reason.

LIST OF PARTIES AND RULE 29.1 STATEMENT

John A. Taylor ("Taylor") is a claimant for benefits under the Black Lung Benefits Act. He was the petitioner in the court of appeals and is a respondent here. The Clinchfield Coal Company ("Clinchfield") is the mine owner that last employed Taylor. Clinchfield was the respondent in the court of appeals and is the petitioner in this Court.

Albert C. Dayton ("Dayton") is also a claimant for benefits under the Black Lung Benefits Act. He was the petitioner in the court of appeals and is a respondent here. The Consolidation Coal Company ("Consol") is the mine owner that last employed Dayton. Consol was the respondent in the court of appeals and is the petitioner here.

The Director, Office of Workers' Compensation Programs, is the employee of the United States Department of Labor ("DOL" or "Labor") assigned general responsibility by the Secretary of Labor for the administration of the federal black lung benefits program. The Director, by delegation, is a statutory party in interest in black lung claims. 30 U.S.C. § 932(k). The Director was a respondent in the court of appeals, and is a respondent in this Court, in both cases.

Clinchfield is a wholly-owned subsidiary of the Pittston Companies. Consol is a wholly-owned subsidiary of E.I. du Pont de Nemours & Company.

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JOINT BRIEF FOR THE PETITIONERS CLINCHFIELD COAL COMPANY AND CONSOLIDATION COAL COMPANY

OPINIONS BELOW

In Taylor's case, the opinion of the court of appeals is reported at 895 F.2d 178. Taylor App. 4a-16a.[1] The Order of the court of appeals denying petitions for rehearing filed by Clinchfield and DOL is unreported. Taylor App. 1a. The decision and order of the Benefits Review Board, United States Department of Labor, is unreported. Taylor App. 17a-19a. The Decision and Order of the Administrative Law Judge ("ALJ")—Rejection of Claim is unreported. Taylor App. 20a-32a.

In Dayton's case, the opinion of the court of appeals is reported at 895 F.2d 173. Dayton App. 2-7. The order of the court of appeals denying DOL's petition for rehearing and suggestion for rehearing en banc is unreported. Dayton App. 1. The decision and orders of the Benefits Review Board, Dayton App. 8-13, and the ALJ, Dayton App. 14-27, are unreported.

JURISDICTION

In both cases, the judgments of the court of appeals were rendered on February 5, 1990. In both cases, the court of appeals enlarged the time for filing petitions for rehearing to and including March 16, 1990. Timely petitions for rehearing were filed by Clinchfield in *Taylor* and by DOL in both cases. The court of appeals denied all petitions for rehearing on April 20, 1990. Taylor App. 1a; Dayton App. 1.

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[1] The Solicitor General's motion to dispense with the printing of the joint appendix in Nos. 90-113 and 90-114 was granted on November 26, 1990. All necessary materials are reprinted in the appendices to the petitions for certiorari. In this Brief, citations to the "Taylor App." refer to the Appendix to the Petition for Writ of Certiorari filed by Clinchfield in No. 90-113. Citations to the "Dayton App." refer to the Appendix to the Petition for Writ of Certiorari filed by Consol in No. 90-114.

In both cases, jurisdiction was conferred on the court of appeals by the filing of timely petitions for review of the respective decision and orders of the Benefits Review Board, in accordance with 33 U.S.C. § 921(c), *incorporated by reference into* 30 U.S.C. § 932(a).

The jurisdiction of this Court is invoked in these cases under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following authorities are reprinted in the Taylor Appendix:

1. U.S. Const. amend. V. Taylor App. 33a.

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1988). Taylor App. 34a.

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1988). Taylor App. 35a-36a.

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1988). Taylor App. 37a-38a.

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1988). Taylor App. 39a.

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7. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1990). Taylor App. 43a-45a.

STATEMENT OF THE CASE

A. Introduction

These consolidated cases mark the third time this Court has agreed to examine the meaning of a controversial DOL black lung eligibility regulation called the "interim presumption." There are two versions of the interim presumption. One was promulgated by the Social Security

Administration ("SSA") in 1972, at 20 C.F.R. § 410.490 (1990). The other was adopted by Labor in 1978, at 20 C.F.R. § 727.203. Real and perceived differences between the two presumptions have generated a substantial volume of litigation because of 30 U.S.C. § 902(f)(2) ("section 902(f)(2)"). Section 902(f)(2) provides: "Criteria applied by the Secretary of Labor" in certain categories of black lung claims "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 [with SSA] . . . ." SSA's rule applies only in claims filed with and adjudicated by SSA. DOL's rule applies only in claims adjudicated by DOL. Thus, in a claim that is denied under DOL's rule, there is a possibility that the claimant may challenge the denial on the theory that benefits would have been awarded if entitlement were adjudicated under SSA's rule.

In *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) ("*Pittston Coal Group*"), this Court invalidated DOL's rule to the extent that it precluded invocation of DOL's presumption by x-ray, biopsy or autopsy evidence unless the miner worked as a coal miner for at least ten years. This conclusion was compelled, in the opinion of the Court, because SSA's presumption was less restrictive. It could be invoked by a shorter term miner if (1) the record established the existence of pneumoconiosis ("black lung" disease) by x-ray, biopsy or autopsy evidence, and (2) additional evidence demonstrated that the disease diagnosed by these methods was caused by coal dust exposure. *Id.* at 109.

In *Pittston Coal Group*, this Court was also asked to address the Fourth Circuit's apparent invalidation of other portions of DOL's presumption permitting its rebuttal on the basis of proof (1) that the miner's total disability or death was not due in part to coal mine employment, or (2) that the miner does not or did not suffer from black lung disease. 20 C.F.R. § 727.203(b)(3), (4); *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *aff'd in part sub. nom.*

Pittston Coal Group, 488 U.S. at 121. Consideration of these matters was, however, deflected by a concession that the rebuttal rules adopted by DOL are valid even if they are more restrictive than SSA's rebuttal rules. *Pittston Coal Group*, 488 U.S. at 119.[2]

After *Pittston Coal Group*, several courts of appeals disagreed on the validity of Labor's rebuttal rules. The Sixth Circuit refused to invalidate 20 C.F.R. § 727.203(b)(3), notwithstanding the absence of a comparable provision in SSA's presumption, holding that the language and intent of the Black Lung Benefits Act required the consideration of relevant medical evidence proving that a miner's disability or death was unrelated to black lung disease. *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 202 (6th Cir. 1989).[3]

The Seventh Circuit disagreed, holding that the SSA rule did not require the consideration of relevant medical evidence and was, therefore, less restrictive than DOL's rule requiring the consideration of all relevant medical evidence. *Hubert Taylor v. Peabody Coal Co.*, 892 F.2d 503, 506-07 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (May 2, 1990) (No. 89-1696).[4]

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[2] The concession was explained in briefing and at oral argument. Brief for Respondents Charlie Broyles and Lisa Kay Colley at 18-19 n.20, *Pittston Coal Group*, 488 U.S. 105 (Nos. 87-821, 87-827, and 87-1095 consolidated); *see also* Official Transcript, Proceedings Before the Supreme Court of the United States, at 31-34 (Oct. 3, 1988), *Pittston Coal Group*, *supra*. Counsel of record for Broyles are the same attorneys who now represent petitioner Pauley in No. 89-1714; they have apparently changed their views for purposes of the instant cases.

[3] Milliken was disabled by and died due to arteriosclerotic cardiovascular disease. The ALJ and court relied on proof showing that "pneumoconiosis could not have contributed to Milliken's death and could not have caused any impairment or disability . . . ." 866 F.2d at 197.

[4] A motion to include Hubert Taylor's case among the others was denied by this Court. *Peabody Coal Co. v. Taylor*, 59 U.S.L.W. 3324 (U.S. Oct. 29, 1990) (No. 89-1696). In Hubert Taylor's case, the medical

Next, the Third Circuit upheld section 727.203(b)(3) in a case involving a former coal miner disabled solely as a result of arthritis and a stroke. *BethEnergy Mines Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295 (3d Cir. 1989), *cert. granted sub nom. Pauley v. BethEnergy Mines Inc.*, 59 U.S.L.W. 3325 (U.S. Oct. 29, 1990) (No. 89-1714). The court of appeals refused to interpret section 410.490 and 30 U.S.C. § 902(f)(2) as mandating that "a claimant who is statutorily barred from recovery may nevertheless recover." 890 F.2d at 1299-1300 (footnote omitted).

The Fourth Circuit followed with its decisions in *Taylor* and *Dayton*. Relying on its prior analysis in *Broyles*, the Fourth Circuit reversed denials of benefits in Taylor's and Dayton's cases even though these miners do not suffer from black lung disease. The court observed, very simply, that the absence of the disease was not a basis for rebuttal under the SSA rule, and it could not, therefore, support rebuttal under DOL's rule in keeping with the restrictivity prohibition of section 902(f)(2). *Taylor*, 895 F.2d at 182-83; *Dayton*, 895 F.2d at 175.

The employers in *Hubert Taylor*, *John Taylor* and *Dayton*, and the claimant in *Pauley* filed petitions for certiorari. The Court granted writs in *John Taylor*, *Dayton* and *Pauley* and consolidated the cases for review.[5]

B. Background of the Black Lung Benefits Program

The Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988) ("the Act"),[6] establishes a federal program to compensate coal miners and their families for total disability or death due to coal workers' pneumoconiosis. *Id.* § 901(a). The program is divided into two segments called "Part B," *id.* §§ 921-925, and "Part C," *id.* §§ 931-945. The Part B program began on December 30, 1969, and terminated for new claims on June 30, 1973. Part B claims were filed with SSA and adjudicated under regulations published by the Secretary of Health, Education and Welfare ("HEW"). Benefits awarded under Part B are paid by the U.S. Treasury from general revenues. *See Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 139 (1987). Part B claims are adjudicated in accordance with procedures specified in section 205 of the Social Security Act. 42 U.S.C. § 405, *incorporated by reference into* 30 U.S.C. § 923(b).

Claims filed on or after July 1, 1973 (*i.e.*, Part C claims), are filed under the workers' compensation law of the state in which the miner was employed, if that law has been found adequate by the Secretary of Labor. 30 U.S.C. § 931. In the absence of an approved state law,[7] the claimant may file a claim with the U.S. Department of Labor under regulations published by the Secretary of Labor. *Id.* §§ 902(f), 932, 936.[8] Approved Part C claims are paid by

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evidence demonstrated minimal pneumoconiosis that did not prevent Taylor from working. This Court's disposition of the cases accepted for review at this time should also resolve the question presented in Hubert Taylor's case.

[5] This brief is filed jointly by Clinchfield and Consol to seek reversal of the Fourth Circuit's decisions in Nos. 90-113 and 90-114. Separate briefs are unnecessary. The arguments made in this joint brief are equally relevant to the Court's consideration of Mrs. Pauley's case.

[6] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635, the Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 312, 313, and the Omnibus Budget Reconciliation Act of 1987, 101 Stat. 1330.

[7] No state's law has been approved under 30 U.S.C. § 931.

[8] The statutory procedures for the adjudication of Part C claims are set forth in the Longshore Act. 33 U.S.C. §§ 901-950 (1988), *incorporated by reference in part into* 30 U.S.C. § 932(a). These include an Administrative Procedure Act trial before an ALJ, 5 U.S.C. § 554, *incorporated by reference into* 33 U.S.C. § 919(d), an administrative appeal to the Benefits Review Board, *id.* § 921(b), and a further appeal to a United States court of appeals, *id.* § 921(c).

the mine operator that last employed the miner or by its insurance carrier, 20 C.F.R. Part 725, subpart F (1990), or by an accounting entity called the Black Lung Disability Trust Fund, 30 U.S.C. §§ 932, 933, 934, 934a (repealed 1982).[9] The Trust Fund is financed by a manufacturers excise tax on coal. 26 U.S.C. § 4121. If unable to meet current obligations from coal tax revenues, the Trust Fund borrows from the Treasury and is obligated to repay these amounts with interest.[10] 26 U.S.C. § 9501(c).

Parts B and C also differ in concept. Part B was a remedial measure designed to establish a special benefit for miners whose state workers' compensation laws did not, in the past, compensate disability or death due to black lung disease. *See* H.R. Rep. No. 460, 92d Cong., 2d Sess., pt. 1, at 5-7 (1971); *Hearings on H.R.18, H.R. 42, H.R. 43 and H.R. 5702 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 56-58 (1971). Part C was intended to facilitate the integration of the federal program into existing state workers' compensation laws or to function like, and in lieu of, a state workers' compensation program.[11]

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[9] The Trust Fund is responsible for the payment of claims predicated upon coal mine employment terminated prior to January 1, 1970, 30 U.S.C. § 932(c), or where no responsible mine owner can be identified, or if the identified mine owner refuses to pay the claim, 26 U.S.C. § 9501(d), *incorporated by reference into* 30 U.S.C. § 932(j). The Trust Fund also pays all administrative expenses of the black lung program, *id.* § 9501(d)(5), and the attorneys' fees of counsel representing claimants whose benefits are paid by the Trust Fund. *See, e.g., Republic Steel Corp. v. United States Dep't of Labor*, 590 F.2d 77 (3d Cir. 1978).

[10] As of September 1989, the Trust Fund owed over $3 billion to the Treasury. U.S. Dep't of Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1989).

[11] Section 224a(2)(A) of the Social Security Act, 42 U.S.C. § 424a(2)(A), requires the reduction of social security disability insurance benefits by workers' compensation benefits paid to the SSDI beneficiary. For purposes of section 224, Part C benefits are deemed workers' compensation benefits but Part B benefits are not. 30 U.S.C. § 922(b).

See H.R. Rep. No. 460, *supra* at 26-28; S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) (stating it was "intended that traditional workers' compensation principles . . . be included within [Part C] regulations"); *see also Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 397 (7th Cir. 1987).

C. Origins of the Interim Presumptions

The original Act delegated exclusive authority to write medical eligibility rules for both Part B and Part C claims to the Secretary of HEW.[12] Congress substantially revised the Act in 1972. Black Lung Benefits Act of 1972, Pub. L. No. 29-303, 86 Stat. 150 (1972) (codified in scattered sections of 30 U.S.C.); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-36 (1976). These amendments did not empower DOL to write eligibility regulations, but the deliberations preceding enactment of the amendments brought to Congress's attention several problems experienced by SSA in its efforts to process claims. These problems included an unexpectedly large volume of filings and a shortage of medical testing facilities in coal mining regions. S. Rep. No. 743, 92d Cong., 2d Sess. 18-19 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322-23.

Although the 1972 amendments did not respond directly to these concerns, the Senate Committee on Labor and Public Welfare included in its Report special instructions to SSA.

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[12] *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 402(f), 411, 83 Stat. 793 (1969). The Secretary of Labor believed he had no authority to write medical eligibility standards and so informed Congress. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* 508, 522-26 (Comm. Print 1979) ("*1977 Legislative History*").

> Accordingly, the Committee expects the Secretary [of HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these Amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claim [sic] on the basis of medical evidence other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described [by HEW].

Id.

SSA complied[13] by promulgating section 410.490, entitled "Interim Adjudicatory Rules for Certain Part B Claims . . . ." At the same time, SSA also published permanent medical eligibility regulations for use if section 410.490 was unavailing in a particular case, 20 C.F.R. § 410.490(e), and for application in all Part C claims. *Id.* §§ 410.401-476. When the DOL program came on line in 1973, Labor adopted SSA's permanent rules by reference, excluding section 410.490. 20 C.F.R. § 718.2, 38 Fed. Reg. 16,965 (1973) (amended 1978).

Congressional oversight of the black lung program was pervasive in the 1970s, and it was not long before program advocates in Congress became aware that DOL was approving a lower percentage of claims than had SSA. The unavailability of an interim presumption was identified as an important reason for this disparity. *See Oversight of the Administration of the Black Lung Program, 1977: Hearings*

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[13] One commentator has concluded that the Senate Report language was part of a secret arrangement between SSA and Senate Committee staff to ensure an increased approval rate for SSA claims. Nelson, *Black Lung: A Study of Disability Compensation Policy Formation* 92 (1985).

Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 49 (1977) ("*1977 Senate Hearings*"); *Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 341, 349, 399 (1973-1974).

Congress began the consideration of another round of comprehensive black lung amendments in the mid-1970s. In the course of these proceedings, the committees involved considered many proposed revisions to the Act. *See 1977 Legislative History, supra* note 12, at 1-109. The use of an interim presumption by DOL was among the revisions considered, and this generated controversy.

Two SSA staff physicians testified variously that the medical criteria in section 410.490 were scientifically invalid, and that SSA's lawyers wrote section 410.490 to eliminate the agency's backlog, erring on the side of an award.[14] Labor Department witnesses echoed SSA's views and sought authority to write scientifically supportable eligibility rules.[15] The Comptroller General of the United States reported that SSA's application of section 410.490

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[14] *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA) ("*1977 House Hearings*"); *1977 Senate Hearings, supra* p. 10, at 193-95 (testimony of Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA). The American Lung Association and the American Thoracic Society also urged Congress not to perpetuate the use of scientifically invalid benefit eligibility criteria like those contained in the SSA presumption. *1977 House Hearings, supra* at 259-60 (statement of Hans Weill, M.D.).

[15] *1977 Senate Hearings, supra* p. 10, at 154; *1977 House Hearings, supra* note 14, at 241 (testimony of Donald Elisburg, Assistant Secretary of Labor).

produced large numbers of "unsubstantiated" awards.[16] This Report concluded that any effort to make the SSA interim presumption applicable to Part C claims should also direct the Labor Department to substantiate entitlement by medical evidence. SSA informed the Comptroller General that it was unable to develop evidence substantiating an award under the presumption because it lacked the resources to do so.[17] Although SSA clearly admitted that it did not attempt to substantiate entitlement by developing or considering rebuttal evidence, the agency never denied the possibility of rebuttal or expressed an opinion that the rebuttal of any fact presumed under section 410.490 was not contemplated by the agency's rule.

The House passed a bill requiring the Labor Department to apply criteria "not more restrictive than" SSA criteria in Part C claims. H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977). The Senate bill authorized the Secretary of Labor to write new Part C eligibility criteria. S. 1538, 95th Cong., 1st Sess. § 2 (1977). The compromise bill conformed to the Senate version, but also provided that until DOL published better eligibility regulations, criteria applicd to claims filed before issuance of the new rules "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973. . . ." 30 U.S.C. § 902(f)(2).

Like the interim presumption itself, the administrative practices followed by SSA in applying the rule were, as noted, controversial. In keeping with the recommendations of the Comptroller General, the conferees on the 1977 amendments cautioned DOL not to repeat SSA's history of making unsubstantiated awards:

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[16] Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements Are Needed* 43-47, 51-52 (1977), *reprinted in 1977 Senate Hearings, supra* p. 10, at 316-20, 324-25.

[17] *Id.* at 46.

> The conferees intend that the Secretary of Labor shall promulgate regulations for the determination of total disability or death due to pneumoconiosis. With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, *except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.*

H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309 (emphasis added).

This admonition carried over into the floor debates prior to enactment. Senator Javits, a conference manager, stated:

> I . . . requested that the statement of managers include language to the effect that "all relevant medical evidence" be considered in applying the interim standards . . . in order to more clearly explain the intent of the new section 402(f)(2) of the act. . . .
>
> These amendments I believed were not intended to require payment of a claim where the evidence in the file is fragmentary or otherwise incomplete, but to require payment of a claim when there is evidence of the presence of pneumoconiosis and that it has caused disability for coal mine work. . . .

124 Cong. Rec. 2330, 2333 (1978). A similar understanding was expressed in debate among the House conference managers: "We do recognize in the joint explanatory statement that the Secretary of Labor may apply the interim stand-

ards to Part C claims within the context of all relevant medical evidence. But there is no such direction or requirement imposed on HEW . . . ." 124 Cong. Rec. 3426, 3431 (1978) (statement of Congressman Perkins). It is clear that Congress ordered DOL to write an interim presumption requiring the consideration of all relevant medical evidence at some point in the adjudication of a claim, and to take appropriate steps to ensure the validity of awards.

D. A Comparison of the Presumptions

1. Invocation

DOL published its interim presumption on August 18, 1978. 43 Fed. Reg. 36,825 (1978). There are similarities and differences between it and the SSA version. Both are burden shifting devices that relieve the claimant of the need to prove all of the elements of entitlement.[18] If invocation of either presumption is proven by the claimant, a prima facie case of entitlement is established. 20 C.F.R. §§ 410.490(b), 727.203(a).

DOL's rule lists five alternative ways to invoke while SSA's lists two. *Compare* 20 C.F.R. § 410.490(b)(1)-(3) *with id.* § 727.203(a)(1)-(5). After *Pittston Coal Group*, x-ray, biopsy or autopsy proof of the existence of pneumoconiosis combined with either ten years of coal mine employment or independent proof that the disease is caused by coal mine employment is sufficient to establish either presumption. Fifteen years of underground or comparable mining employment coupled with pulmonary function test

[18] The Act compensates total disability or death due to pneumoconiosis exclusively. Benefits may not be awarded unless (1) the existence of pneumoconiosis is established, (2) the disease arose out of coal mining exposure, (3) the miner is totally disabled or deceased, and (4) the total disability or death of the miner was caused, at least in part, by the occupationally related disease. *See Mullins Coal Co.*, 484 U.S. at 141.

("PFT")[19] results meeting published values may establish the SSA presumption. *Id.* § 410.490(b)(1)(ii). Ten years of employment in any type of coal mining coupled with qualifying PFT results establish the DOL presumption. *Id.* § 727.203(a)(2). The DOL presumption may also be invoked with a ten-year history of coal mine employment and arterial blood gas ("ABG") test results[20] meeting published values, medical opinion evidence establishing the presence of a totally disabling respiratory or pulmonary impairment or, in the case of a deceased miner, by lay evidence if no relevant medical evidence is available. *Id.* § 727.203(a)(3)-(5). SSA's interim presumption does not include blood gas invocation criteria, but the agency's rules elsewhere establish a blood gas based method for an award. 20 C.F.R. Part 410, subpart D, Appendix. It is far more restrictive than DOL's ABG presumption.[21]

SSA's invocation subsection also contains several presumptions within the SSA interim presumption. 20 C.F.R.

[19] PFTs measure an individual's ability to move air in and out of the lungs during the course of specified maneuvers. Test results do not establish a diagnosis of any particular disease but may detect a deviation from normal pulmonary capabilities attributable to an array of acute or chronic illnesses. *See* A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Diseases* 4-5, 19, 67-68 (1986). The threshold values needed for invocation of both the SSA and DOL presumptions are essentially normal for older miners and were set at that level to make the presumption more readily available. *1977 House Hearings, supra* note 14, at 274-75 (testimony of Harold I. Passes, M.D.).

[20] ABGs measure dissolved gases in arterial blood. Abnormal results are not diagnostic of pneumoconiosis and may reflect a wide variety of acute or chronic illnesses. *Miller, supra* note 19, at 162, 176, 376-78.

[21] Under SSA's rule, the claimant must prove the existence of pneumoconiosis and present qualifying ABG test results. Qualifying ABG scores are more difficult to obtain under the SSA rule. It is also not apparent that the SSA rule shifts the burden of persuasion away from the claimant. *Compare* 20 C.F.R. Part 410, subpart D, Appendix *with* 20 C.F.R. § 727.203(a)(3).

§ 410.490(b)(2), (3). First, under section 410.490(b)(2), a claimant whose proof satisfies the x-ray, biopsy, autopsy or PFT criteria cannot benefit from the SSA interim presumption unless the abnormality detected "arose out of coal mine employment." The cross-reference in section 410.490(b)(2) to 20 C.F.R. §§ 410.416 and 410.456, makes clear that the "impairment" or "pneumoconiosis" is presumed to have arisen out of coal mine employment, "in the absence of persuasive evidence to the contrary" if the miner worked in coal mining for at least ten years, *id.* §§ 410.416(a), 410.456(a), or if the proof establishes that the impairment arose out of coal mine employment, *id.* §§ 410.416(b), 410.456(b); *see also Pittston Coal Group*, 488 U.S. at 109. Section 410.490(b)(3) addresses PFT invocation only, and it presumes total disability or death due to pneumoconiosis if the miner had at least ten years of mining employment.[22] It is apparent, however, that invocation of the SSA rule cannot be completed unless section 410.490(b)(1) proof also satisfies the requirements of section 410.490(b)(2) and (3).

2. Rebuttal

Invocation of either presumption shifts the burdens of production and ultimate persuasion to the government or the mine operator. *See Mullins Coal Co.*, 484 U.S. at 144 & n.12. DOL's rebuttal rule begins with a caveat requiring the consideration of "all relevant medical evidence." *Id.* at 149-50; 20 C.F.R. § 727.203(b). SSA's rule makes no similar nor contradictory statement.

Either presumption is rebutted if the miner is performing "his usual coal mine work or comparable and gainful work." 20 C.F.R. §§ 410.490(c)(1), 727.203(b)(1). The SSA rule specifies only one additional rebuttal methodology,

[22] Section 410.490(b)(3) is either surplusage or a mistake, or the reference to "paragraph (b)(1)" in section 410.490(b)(2) is overinclusive. *See Pittston Coal Group*, 488 U.S. at 129 (Stevens, J. dissenting).

while DOL's rule lists three. SSA's remaining provision requires rebuttal if:

> Other evidence including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (*see* § 410.412(a)(1)).

Id. § 410.490(c)(2). Section 410.412(a)(1) is part of a rule called " 'Total disability' defined." Paragraph (a)(1) provides that "[a] miner shall be considered totally disabled due to pneumoconiosis if: (1) his pneumoconiosis prevents him from engaging in gainful work . . . (that is, "comparable and gainful work;" *see* §§ 410.424-410.426. . . .)." Sections 410.424-410.426 list medical and non-medical criteria for determining whether the miner is totally disabled "due to pneumoconiosis." 20 C.F.R. §§ 410.424, 410.426.

DOL's second rebuttal method is similar to, but not the same as, SSA's second method. DOL's rule contemplates rebuttal if "in light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (*see* § 410.412(a)(1) of this title)." 20 C.F.R. § 727.203(b)(2). SSA's focus on "other evidence" in contrast to DOL's focus on "all relevant evidence" may reflect the fact that SSA's invoking evidence is pre-tested for relevance and meaning prior to invocation under section 410.490(b)(2), (3).[23]

DOL's rule also contains two rebuttal methods not specifically included in SSA's rule. The DOL presumption is

[23] The difference may reflect SSA's preference for a "cookbook" approach to deciding claims in contrast to DOL's preference for traditionally adjudicated determinations. This possibility is supported by SSA's occasional findings that its interim presumption was rebutted by negative blood gas tests (*i.e.*, exercise tolerance tests) and PFTs. *See e.g., Oliver v. Califano*, 476 F. Supp. 12, 16 (D. Utah 1979); *Mutter v. Weinberger*, 391 F. Supp. 951 (W.D. Va. 1975).

rebutted if the proof establishes that the miner's total disability or death "did not arise in whole or in part out of coal mine employment," 20 C.F.R. § 727.203(b)(3), or if "the evidence establishes that the miner does not, or did not, have pneumoconiosis," *id.* § 727.203(b)(4). Accordingly, whatever facts are presumed after invocation in a DOL case are rebuttable if the record as a whole demonstrates the falsity of the presumed fact.[24] On the other hand, SSA's rule is structurally complex, making it more difficult to determine precisely where each element of entitlement is considered.

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[24] There are hundreds of reported decisions by the courts of appeals interpreting DOL's rebuttal provisions and many subtle variations in the approaches taken within and among the circuits. Generally, rebuttal may be established under section 727.203(b)(2) if the miner is not physically disabled for work by a health impairment. *See, e.g., Ramey v. Kentland Elkhorn Coal Co.*, 755 F.2d 485, 486 n.3, 490 (6th Cir. 1985). Rebuttal by this method is not precluded if the miner is unemployed or too old to work. *See Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 908-09 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 84 (1990); *Taft v. Alabama By-Products*, 733 F.2d 1518, 1522 (11th Cir. 1988) ("the Act should provide payment for medical disability and should not be a form of unemployment compensation."). Rebuttal by the third method is generally established if the employer affirmatively demonstrates that pneumoconiosis did not contribute to the miner's disabling condition or death. *See, e.g., Peabody Coal Co. v. Holskey*, 888 F.2d 440, 442 (6th Cir. 1989); *Amax Coal Co. v. Burns*, 855 F.2d 499, 502 (7th Cir. 1988); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 124 (4th Cir. 1984). Rebuttal may be established under the fourth method if the proof affirmatively demonstrates that the miner does not have clinical pneumoconiosis (diagnosed by x-ray, biopsy or autopsy evidence) or so-called "legal" pneumoconiosis defined as a "respiratory or pulmonary impairment arising out of coal mine employment." *See* 30 U.S.C. § 902(b); *see also Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727 (6th Cir. 1986); *Knudtson v. Benefits Review Board*, 782 F.2d 97, 100 (7th Cir. 1986); *Long v. Itmann Coal Co.*, No. 84-1865, 838 F.2d 466 (Table) (4th Cir. May 19, 1987). Rebuttal of the DOL presumption is accomplished only by strongly persuasive evidence demonstrating the falsity of a presumed fact.

E. John Taylor's Case

Taylor retired from mining in 1972, after eleven and three quarters years of coal mine employment, and filed a claim for benefits with DOL on November 5, 1976. Taylor App. 23a-24a. The ALJ found that chest x-rays failed to prove the existence of pneumoconiosis and none of the PFTs submitted satisfied DOL's invocation standards. *Id.* at 27a.[25] Several recent ABG studies met invocation values and the DOL presumption was invoked on this basis. Turning to a rebuttal inquiry, the ALJ surveyed a record that persuasively and overwhelmingly attributed Taylor's blood gas abnormality to obesity and chronic bronchitis due to a long, ongoing history of cigarette smoking. *Id.* at 29a-31a.[26] The ALJ concluded that the presumption was rebutted under 20 C.F.R. § 727.203(b)(3) and (4) by proof that Taylor did not have pneumoconiosis or any related disability. Taylor App. 31a.

The Benefits Review Board affirmed on May 14, 1987. *Id.* at 19a. Taylor filed a substantial evidence appeal with the Fourth Circuit. He suggested that *Pittston Coal Group*, as a matter of principle, invalidated the third and fourth rebuttal methods in DOL's regulations. The court of appeals agreed, noting simply that DOL's rule had extra rebuttal provisions not in SSA's rule. It held that those extra provisions could not be applied in light of *Pittston Coal Group* and 30 U.S.C. § 902(f)(2). 895 F.2d at 182-83.

The court's reasoning is strictly impressionistic; it includes no careful textual analysis of SSA's rule. The court found it immaterial that Taylor's qualifying blood gas stud-

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[25] Thus Taylor could not have invoked the SSA presumption.

[26] One pulmonary disease specialist reported: "As to the etiology of his chronic bronchitis, I think it is without question secondary to his years of cigarette smoking. . . . I do not believe that he has any impairment that could be possibly attributed to coal workers' pneumoconiosis." Taylor App. 30a-31a.

ies could not have invoked the SSA presumption. It held: "[W]e do not accept any argument that the rebuttal provisions must be pegged to the invocation provisions. It is the fact of establishment . . . which is of consequence . . . , not the number of the regulation which provides for such establishment." *Id.* at 182. The court of appeals vacated the denial and remanded.[27] Chief Judge Ervin dissented. He sided with the Third and Sixth Circuits' holdings validating DOL's rebuttal rules:

> It seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and confusing regulations we do less violence to congressional intent, and avoid both upsetting the statutory scheme and raising due process problems. To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.

Id. at 184 (Ervin, C.J. dissenting).

F. Albert Dayton's Case

Dayton filed his claim on November 26, 1979, after seventeen years of coal mine employment. The ALJ found Dayton's chest x-rays to be preponderantly negative, but

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[27] The court of appeals ruled out any possibility of rebuttal if the miner did not have pneumoconiosis, 895 F.2d at 183, but remanded for review of the "disability causation" question under 20 C.F.R. § 410.416. The court erroneously concluded that section 410.416 and section 727.203(b)(3) addressed the same fact element. The SSA provision focuses on the cause of a miner's disease while the DOL rebuttal rule addresses the cause of the miner's total disability. Later, the Fourth Circuit acknowledged this error suggesting the irrelevancy of a remand for this purpose. *Robinette v. Director, Office of Workers' Compensation Programs*, 902 F.2d 1566 (Table), slip op. at 8 & n.9 (4th Cir. Apr. 27, 1990), *petition for cert. filed*, 59 U.S.L.W. 3073 (U.S. July 25, 1990) (No. 90-172). In *Robinette*, the Fourth Circuit asked Congress or this Court "to clarify these confusing regulations."

invoked DOL's presumption in light of PFT results meeting published guidelines. Dayton App. 19-20. After a review of the entire record, including the reports of several pulmonary disease specialists, the ALJ concluded that Dayton was not totally disabled for work and did not suffer from pneumoconiosis. DOL's presumption was, therefore, persuasively rebutted under both sections 727.203(b)(2) and (4).[28] Dayton App. 24, 26. There was no need to address the cause of Dayton's non-existent disability.

The Benefits Review Board affirmed the ALJ's conclusion that Dayton did not have pneumoconiosis, finding it unnecessary to address the ALJ's alternative finding that Dayton was not totally disabled. Dayton App. at 10 n.1, 12. Dayton appealed to the Fourth Circuit. Relying exclusively on its decision in *Taylor*, the court of appeals reversed and remanded for adjudication under section 410.490. 895 F.2d at 176.[29] The Fourth Circuit dismissed the ALJ's finding of no pneumoconiosis as "superfluous" and having "no bearing on the case." *Id.* at 176 n.*.

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[28] There is no logical mismatch between qualifying PFTs and an absence of disability. PFT invocation values merely trigger a burden of proof shift and were not designed to detect true disability. *See 1977 House Hearings*, *supra* note 14, at 259-60, 274-75 (testimony of Hans Weill, M.D.; testimony of Dr. Harold I. Passes); *see also Mullins Coal Co.*, 484 U.S. at 143; *Pittston Coal Group*, 484 U.S. at 138 (Stevens, J. dissenting) (citing SSA testimony stating, "it was acknowledged that these criteria would not necessarily describe a level of impairment which would impose a functional limitation on the individual." Citation omitted).

[29] The Fourth Circuit refused to consider the ALJ's finding that in Dayton's case the DOL presumption was also rebutted under section 727.203(b)(2), which is roughly equivalent to SSA's rebuttal section 410.490(c)(2). Here, the court noted that the Board did not review this matter, and the court would not, therefore, do so. 895 F.2d at 175. The Fourth Circuit also refused to consider the Government's suggestion that precluding rebuttal by proof that the miner has no occupationally related disease or disability violates the operator's due process rights. The Court deemed it an "interesting question" but believed that it was not one that DOL's lawyers could raise. *Id.*

SUMMARY OF ARGUMENT

The court below reached a decision that is irrational and unnatural. It requires mine operators to pay federal black lung benefits to miners who do not have black lung disease. The Fourth Circuit's conclusion is not the product of an evidentiary quirk or newly discovered backwater of the Act affecting only a few black lung cases. The conclusion affects thousands of pending cases, and had it been reached a decade ago, would have made a difference in hundreds of thousands of cases. The conclusion reorders the basic landscape of the program, springs an unexpected, unfunded, and most likely unfundable liability on the industries involved, and is fundamentally unreasonable.

The court below held that DOL's interim presumption violates the restrictivity prohibition of 30 U.S.C. § 902(f)(2) because the DOL rule permits rebuttal by proof that the miner did not suffer from pneumoconiosis or related disability or death, while SSA's rule does not. The court also held in *Taylor* that invocation of the DOL presumption by blood gas studies preserves the more limited SSA rebuttal rules, even though SSA did not permit invocation of its presumption by blood gas test results.

However one patches together bits and pieces of the Act, the rules, and the case law, the conclusion of the Fourth Circuit makes no sense. It tacitly assumes that Congress deliberately misled the mining and insurance industries, the Department of Labor and the American public. It assumes a uniquely punitive intent on the part of Congress that is so strong and unfocused on any genuine wrongdoer, that it justifies the wholesale deprivation of defendants' fundamental rights to have their day in court. It assumes that Congress wrote a law requiring employers to fund and compensate total disability or death due to a distinct occupational disease but, in reality, was disinterested in whether the employer was in any way responsible for causing disease, disability or death. If the Fourth Circuit's assumptions are legally viable, they certainly go well beyond any theory of liability known to our legal system.

The Fourth Circuit's holding and underlying assumptions are not, however, correct. They are the product of an incomplete and simplistic review that cannot withstand careful scrutiny.

Although the language and contours of the Act are critically important, one need not even consult the Act to see that the Fourth Circuit's elemental comparison of the two rules was inaccurate. SSA's criteria allowing the affirmative use of blood gas test evidence are plainly more restrictive than DOL's. *Compare* 20 C.F.R. Part 410, subpart D, Appendix *with* 20 C.F.R. § 727.203(a)(3). On the rebuttal side, DOL's rule allowing rebuttal if the miner does not or did not have pneumoconiosis is not more restrictive and is probably less so than SSA's approach. SSA requires the claimant to affirmatively prove that he has pneumoconiosis before the SSA presumption may be invoked. 20 C.F.R. §§ 410.490(b)(2), (3). No rebuttal rule on this fact element is necessary within the SSA scheme. Similarly, DOL's rule allowing rebuttal if the disability or death of the miner did not arise in part out of coal mining, *i.e.*, the "disability causation" element, is also in SSA's rules. It is only more difficult to find. To find it, one follows the cross-references in section 410.490(c)(2) to section 410.412(a)(1) and section 410.426(a). Upon arrival, it is apparent that SSA's disability causation criterion is a "primary reason" standard that looks fairly restrictive in comparison to DOL's "in whole or in part" approach. The comparison test alone demonstrates the Fourth Circuit's error.

The Act confirms the lower court's error. The Act focuses the inquiry in all claims on total disability or death due to pneumoconiosis. It prohibits the assignment of liability to a mine operator unless the mine operator was responsible for causing the requisite total disability or

death. 30 U.S.C. § 932(c). The Act also directs the claim adjudicator to ensure that all the relevant evidence that has meaning in connection with each element of the claim is given full and proper consideration. *Id.* § 923(b). The legislative history, for all its rhetoric, is fully supportive.

Although a deference analysis should not be necessary, it too validates DOL's rebuttal rules. DOL's election to write regulations on the assumption that the Act means what it says is difficult to fault. The ambiguities, complexities, and inconsistencies in SSA's body of regulations cannot detract from this conclusion.

Finally, if the court below read 30 U.S.C. § 902(f)(2) correctly, the due process concern expressed by dissenting Chief Judge Ervin and others is very real. The Due Process Clause circumscribes legislation that takes private property for no good reason at all. If one person causes injury to another, the Congress may legislate just compensation. It is, we suggest, another matter when Congress makes up the injury and then requires compensation for something that does not exist by prohibiting inquiry into the truth of the matter. If it comes this far, the court below clearly reads 30 U.S.C. § 902(f)(2) to be a truly arbitrary mandate.

The decisions of the Fourth Circuit in these cases should be reversed. The Third Circuit was correct.

ARGUMENT

I.

DOL'S INTERIM CRITERIA ARE NOT MORE RESTRICTIVE THAN SSA'S WITH RESPECT TO BLOOD GAS STUDIES OR REBUTTAL GENERALLY

A. DOL's Third and Fourth Rebuttal Rules Are Not Invalidated Generally By 30 U.S.C. § 902(f)(2)

DOL's rules permitting rebuttal of that agency's interim presumption by proof that the miner does not or did not

have pneumoconiosis or related disability are not facially invalid under section 902(f)(2), because they are not more restrictive than SSA's criteria.

The tension between SSA's and DOL's rules addressed in *Pittston Coal Group* was fairly clear and undisputed. The Court needed only to track the internal cross-references in SSA's rule to determine that DOL's approach disadvantaged short-term coal miners and their survivors presenting valid x-ray, biopsy or autopsy proof of pneumoconiosis. 488 U.S. at 109. The same exercise, testing one rule against the other is required here. DOL's rebuttal rules do not flunk this test, even if the restrictivity prohibition of section 902(f)(2) is applied to the two sets of rules in isolation from the rest of the Act.

The two elements purportedly absent from SSA's criteria are inquiries into (1) whether the miner actually has or had pneumoconiosis, and (2) whether a miner's presumed total disability was caused by that occupational disease.

The fact is that the presence or absence of pneumoconiosis is a critical inquiry in all claims decided under SSA's interim criteria. In order to gain the benefit of SSA's presumption, no claimant may satisfy the criteria in section 410.490(b) merely by meeting the proof requirements of section 410.490(b)(1). The further requirements of paragraphs (b)(2) and (3) must also be considered. Under paragraph (b)(2), a claimant who meets the requirements of paragraphs (b)(1)(i) and (ii) cannot obtain the benefit of the presumption unless "the impairment established . . . arose out of coal mine employment (*see* §§ 410.416 and 410.456)." 20 C.F.R. § 410.490(b)(2). "Pneumoconiosis" is defined in the Act to mean "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). On its face, section 410.490(b)'s prerequisites for invocation include: (1) abnormal x-ray, biopsy, or autopsy

evidence or abnormal PFTs, *and* (2) proof that the abnormality diagnosed by these methods arose out of coal mine employment, *i.e.*, that the abnormalities are due to a coal mine employment related dust disease or impairment.

The cross-references in section 410.490(b)(2) to section 410.416 and 410.456[30] ease this proof element if the miner had ten years of mining employment by erecting a presumption of disease causation that carries the day "in the absence of persuasive evidence to the contrary."[31] 20 C.F.R. §§ 410.416(a), 410.456(a). The short-term miner with the requisite x-ray, autopsy or biopsy evidence gets the section 410.490(b) presumption only if there is direct proof establishing disease causation, *id.* §§ 410.416(b), 410.456(b), and indeed, this is the holding of *Pittston Coal Group*, 488 U.S. at 117. The short-term miner with qualifying PFTs cannot obtain benefit of the presumption at all due to the fifteen-year requirement of section 410.490(b)(1)(ii).

It follows from *Pittston Coal Group's* reliance on sections 410.416 and 410.456 to discern the criteria applicable in the case of certain short-term miners, that the longer

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[30] Section 410.416 applies in the claims of miners and section 410.456 applies in claims filed by survivors of miners. The two rules are not meaningfully different in substance.

[31] There is no logical flaw or true redundancy in this interpretation harmonizing 20 C.F.R. § 410.490(b)(1) with section 410.490(b)(2). PFT tests are not medically competent to establish an occupational cause for below normal test results. *See Miller*, *supra* note 19, at 4-5. Similarly, an abnormal chest x-ray meeting the requirements of section 410.490(b)(1)(i) standing alone is not diagnostic of black lung disease. It may exhibit a lung tissue reaction due to coal dust, other dusts, smoking, an infectious process, or other causes. Pendergrass, *et al.*, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyers Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981). Biopsy or autopsy findings may be more definitive. Typically, the pathologist's report in those circumstances will state the cause of abnormal findings.

term miner's attempt to gain the benefit of the presumption is also dependent upon whether the affirmative proof presented withstands section 410.416(a) or section 410.456(a) rebuttal proof demonstrating that the miner's abnormal x-ray, biopsy, or autopsy, or qualifying PFTs do not show pneumoconiosis. In either case, an SSA adjudication under section 410.490(b) inquires into the presence or absence of pneumoconiosis in the pre-invocation phase of the adjudicator's analysis.[32]

Under DOL's rule, this inquiry takes place only in the rebuttal phase. 20 C.F.R. § 727.203(b)(4). On its face, DOL's approach is probably more favorable to claimants. The "pneumoconiosis" inquiry under the DOL rule clearly assigns the burdens of proof and persuasion on the issue to the employer, while the allocation of the burden of persuasion under SSA's rules is ambiguous, at best, and may lie with the claimant. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 27. SSA's rule tightly links the test results of section 410.490(b)(1) to the occupational causation inquiry under paragraphs (b)(2) or (3), while under DOL's rule, any other indication of pulmonary disease (*e.g.*, medical reports, unlisted tests) may preclude rebuttal of DOL's presumption unless the employer also proves that these other indicators of lung disease are inaccurate or fail to connect the disease to coal dust exposure. Thus, in an SSA claim, proof that qualifying PFTs do not show an impairment arising out of coal mine employment rebuts the section 410.416(a) presumption and eliminates the benefit of section 410.490. In a DOL claim decided under section 727.203, it is not enough to merely rebut PFT

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[32] This conclusion holds under either the *Pittston Coal Group* majority's reading of section 410.490(b)(2) and (b)(3), or the dissent's reading of these rules. Although it is not possible to make perfect sense out of paragraphs (b)(2) and (3), one or both of these rules imposes a substantive disease causation requirement whether the claimant is relying on the x-ray method of proceeding or PFTs. *See Pittston Coal Group*, 488 U.S. at 120; 488 U.S. at 130-31 (Stevens, J. dissenting).

evidence. The employer must prove in light of all the evidence that the miner does not have pneumoconiosis. *See, e.g., Pavesi v. Director, Office of Workers' Compensation Programs*, 758 F.2d 956, 965 (3d Cir. 1985).

The linguistic comparison prescribed by *Pittston Coal Group* validates DOL's rule allowing rebuttal if the miner does not or did not have pneumoconiosis.[33] It suggests that DOL's approach is, in fact, less restrictive than SSA's.

A similar analysis in isolation validates 20 C.F.R. § 727.203(b)(3). Under (b)(3), DOL's presumption is rebutted if it is established that the miner's presumed total disability or death did not arise at least in part from pneumoconiosis. The only explicit reference to a "disability causation" inquiry in SSA's rule appears in section 410.490(b)(3), and that section applies only if the claimant is proceeding on the basis of PFTs. It does not make a great deal of sense to conclude that paragraph (b)(3) requires pre-invocation proof of disability causation for a claimant with qualifying PFTs.[34] It is more likely that the

[33] The Benefits Review Board reached this same conclusion. *Soloe v. Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. (MB) 1-125, 1-126 (Ben. Rev. Bd. 1987). The Fourth Circuit's contrary conclusion in the instant cases is devoid of any consideration of the relevant plain language of the two presumptions.

[34] If, in the case of qualifying PFTs, the claimant must also prove disease causation under section 410.490(b)(2) and disability causation under section 410.490(b)(3), the only thing presumed is that the miner is totally disabled, which is then subject to rebuttal under section 410.490(c). This approach, however, is logically flawed because a person needing to prove the cause of a total disability would first need to prove the existence of a total disability before identifying its cause. Thus, nothing is really presumed and the presumption would have no meaning. Looking at the original text of the proposed sections 410.490(b)(2) and (3), 37 Fed. Reg. 18,013 (Sept. 2, 1972), it seems that what SSA intended to accomplish was to link section 410.490(b)(1)(i) to (b)(2) and to link (b)(1)(ii) to (b)(3) for purposes of settling the disease causation issue pre-invocation. SSA's drafting error, if there is one, lies in its failure to specify that (b)(2) applies only to (b)(1)(i) proof.

disability causation inquiry is a rebuttal matter under section 410.490(c), that is subject to the criteria discerned by following the cross-references in paragraph (c).

In the SSA rule, both rebuttal criteria end with the direction to "see § 410.412(a)(1)." 20 C.F.R. § 410.490(c)(1), (2). The language of section 410.490(c)(1) and (2) is largely definitional. It briefly and incompletely states, within an evidentiary context, the 1972 version of the statutory definition of "total disability." Pub. L. 92-303, Sec. 4, 86 Stat. 153 (1972).[35] Under the 1972 Act, the Secretary of HEW was obligated to define the term total disability by regulation with reference to several statutory criteria. These mandatory criteria include requirements that (1) pneumoconiosis must be the reason the miner cannot work, (2) the disability must prevent the miner from working in his regular mining job, and (3) the disability must also prevent the miner from doing any other job requiring comparable skills and abilities.

The concepts reflected in the statutory terms are defined in detail in SSA's permanent rules beginning with 20 C.F.R. § 410.412 which is entitled " 'Total disability' defined." It is perfectly natural to assume that the references in section 410.490(c) to section 410.412(a)(1) were put there to give more detailed meaning to the provisions of section 410.490(c). Paragraph (a)(1) of section 410.412 again restates the statutory definition describing the general effect pneumoconiosis must have in order to support

The ten year requirement in paragraph (b)(3) in light of the fifteen year requirement in paragraph (b)(1)(ii) is inexplicable.

[35] The 1972 version provides "the term 'total disability' has the meaning given it by regulations of the Secretary of [HEW], except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. . . ." 86 Stat. 153 (1972).

an award of benefits. Section 410.412(a)(1) then directs the reader to "§§ 410.424-410.426." These rules are entitled "Determining total disability: Medical criteria only" and "Determining total disability: Age, education and work experience criteria." Section 410.426(a) thus finally states SSA's disability causation standard. It provides:

> A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments other than pneumoconiosis may not be considered.

20 C.F.R. § 410.426(a).

Since section 410.490 contains no explicit disability causation standard, it is logical to conclude that the one contained in the cross-referenced material applies. This appears to be the way SSA wrote regulations in 1972. If the cross-reference is ignored, or its plain meaning is denied, one may assume that SSA wrote its interim presumption in deliberate disobedience of the command of the 1972 version of section 902(f) requiring SSA to write regulations defining "total disability" to include a causation standard attaching the total disability to pneumoconiosis. It is not likely that SSA overlooked this critical element, and the cross-references indicate that it did not.

When DOL incorporated a disability causation test into its rebuttal provisions,[36] the standard was liberalized from

[36] It is not significant to this analysis that DOL's second rebuttal method like SSA's second method also cross-references section 410.412(a)(1). The group of provisions brought into play by the cross-reference theoretically include SSA's total disability criteria as well as SSA's disability causation standard. The total disability criteria are relevant in a DOL adjudication even if the disability causation standard is superseded in DOL's new third rebuttal provision. To limit any confusion, DOL's interim presumption also includes a caveat stating, "Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section." 20 C.F.R. § 727.203(c). Part 718, at the time of promulgation of DOL's presumption merely incorporated 20 C.F.R. §§ 410.401-410.476. 38 Fed. Reg. 16,966 (1973). Since SSA's primary reason rule is inconsistent with DOL's section 727.203(b)(3), the SSA provision is not included in the incorporation by reference because DOL provided otherwise.

SSA's "primary reason" approach[37] to the "in whole or in part" test in 20 C.F.R. § 727.203(b)(3). DOL's disability causation rebuttal rule is clearly less restrictive than SSA's.

It cannot be argued that SSA's rules present a neat package. They are poorly drafted, circular, ambiguous, and at points unintelligible.[38] In adapting section 410.490 to the adversarial context of Part C, DOL made a reasonable effort to clarify the confusion and design a logical system for the determination of DOL claims subject to the interim presumption. In many respects, DOL's approach is more favorable to claimants. In no respect, other than the one identified in *Pittston Coal Group* is DOL's system demonstrably more restrictive than SSA's. DOL's attempt to enhance the clarity of SSA's criteria does not produce more restrictive criteria and does not surpass the limits of 30 U.S.C. § 902(f)(2).

[37] There are only a handful of reported decisions involving an attempt by SSA to rebut its presumption. In one case in which SSA's interim presumption was invoked by chest x-ray evidence, SSA appears to have argued in favor of a denial of benefits on the grounds that the miner's "disability is due primarily to heart disease not pneumoconiosis." *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 286 (6th Cir. 1983).

[38] The SSA interim presumption contains no rebuttal provisions for application in the claim of a survivor of a miner alleging that the miner's death was due to pneumoconiosis. *But see Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975) (affirming SSA's rebuttal of the section 410.490(b) presumption in a survivor's claim) ("If the Secretary had intended to provide for a rebuttal of the presumption only in the instance of living miners he doubtless would have so stated in more precise terms.").

B. DOL's Blood Gas Presumption Does Not Violate Section 902(f)(2)

Central to the holding in *Pittston Coal Group* is the axiom that the Secretary of Labor is prohibited by 30 U.S.C. § 902(f)(2) from making it more difficult for a claimant to obtain presumptive entitlement than was the case under SSA's rules. *Pittston Coal Group*, 488 U.S. at 117. DOL was not similarly prohibited from making it easier for a claimant to obtain this advantage. If, however, DOL elected to make its criteria less stringent, the agency was free to do so in any appropriate way so long as the restrictivity prohibition was observed.

SSA's interim presumption cannot be invoked by blood gas test evidence. 20 C.F.R. § 410.490(b). SSA's presumption can only be rebutted by blood gas evidence showing an absence of disability. *Id.* § 419.490(c)(2) (referencing physical performance tests). Under SSA's presumption, blood gas test results were used to deny, not approve, claims. SSA adopted a separate rule for the affirmative use of these tests. 20 C.F.R. Part 410, subpart D, Appendix.[39] Under the Appendix, a miner who independently proves the existence of pneumoconiosis acquires a rebuttable presumption of related total disability if blood gas test results meet published criteria. The presumption is rebutted by any "evidence rebutting such finding." *Id.*

DOL substantially liberalized this format by allowing presumptive entitlement solely on the basis of blood gas results coupled with ten years of employment.[40] 20 C.F.R.

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[39] The "Appendix" is an appendix to Subpart D, not to section 410.490. *See* 20 C.F.R. § 410.424(a).

[40] DOL's blood gas table is also more favorable to claimants than is SSA's. By increasing the $p0_2$ value necessary to establish presumptive disability by 5 mm.Hg in each $pC0_2$ category, DOL's rule reduces the degree of impairment necessary to produce an assist for the claimant. In fact, several of the blood gas tests relied upon by the ALJ in invoking DOL's presumption in John Taylor's case would not demonstrate disability under SSA's Appendix.

§ 727.203(a)(3). No proof of pneumoconiosis or of the cause of abnormal test results is required. DOL's rule shifts to the defendant the burden of disproving what the claimant had to prove under SSA's Appendix. Measuring SSA's criteria against DOL's criteria in this regard fails to reveal any possibility that DOL's are more restrictive.

The court below thought it "a matter of indifference" how presumptive entitlement is conferred. 895 F.2d at 182. This is not a matter of indifference but of the statutory limits set by the restrictivity prohibition of section 902(f)(2). Under SSA's "criteria" presumptive entitlement is not available on the basis of blood gas evidence, and there is no basis on which to apply SSA's rebuttal criteria, whatever they provide. The statutory baseline in section 902(f)(2) is SSA's criteria, not a mix and match exercise. For this reason alone, the Fourth Circuit's invalidation of 20 C.F.R. § 727.203(b)(3), (4) in Taylor's case must be reversed.

II.

THE BLACK LUNG BENEFITS ACT PROHIBITS DOL FROM MANDATING AN AWARD WHERE IT IS PROVEN THAT THE MINER DOES NOT HAVE PNEUMOCONIOSIS OR ANY RELATED DISABILITY

If SSA's criteria standing alone do not speak with sufficient clarity to validate DOL's effort to comply with 30 U.S.C. § 902(f)(2), then the Black Lung Benefits Act itself conclusively accomplishes this result. The language of the Act is ultimately controlling, and this language cannot accommodate the conclusions reached by the Fourth Circuit. The Act provides abundant guidance at two levels. First, its specific provisions forbid an award of benefits where total disability or death due to pneumoconiosis is demonstrably absent, and second, its provisions as a whole limit the meaning of the word "criteria" within this mandate.

In *Pittston Coal Group*, this Court held that the word "criteria" in section 902(f)(2) is a broad, general term that does not readily submit to the limitations on its meaning suggested by the Secretary of Labor. 488 U.S. at 115. However broad or general the term may be, it is still a part of a statutory scheme with a specific purpose, and its logic and meaning must be interpreted in that context. " '[I]n expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Dole v. United Steelworkers' of America*, 110 S. Ct. 929, 934 (1990) (quoting *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989), quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

The Act begins with a statement of congressional findings and purposes. It provides in part:

> It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease. . . .

30 U.S.C. § 901(a). The Act has no other stated purpose.

The "criteria" referred to in section 902(f)(2) must surely be criteria for determining whether a miner is totally disabled by or died due to pneumoconiosis. Criteria that are incapable of discerning these facts or that ignore them do not fit very well. That is the clear import of section 902(f). Section 902(f)(1) authorizes the Secretary of HEW and the Secretary of Labor to write regulations defining the term "total disability" for their respective agencies. This authorization is followed by a list of requirements that must be reflected in the regulations. First among these is a proviso stating:

> [I]n the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in [comparable and gainful employment].

Id. § 902(f)(1)(A). Proviso D mandates the development of medical test criteria "which accurately reflect total disability in coal miners as defined in subparagraph (A) [that is, total disability due to pneumoconiosis]." *Id.* § 902(f)(1)(D).

Section 902(f)(2) completes the list of requirements directing DOL to employ special criteria for certain claims that are not more restrictive than those adopted by SSA. The natural reading of section 902(f)(2) in light of section 902(f) as a whole is that the criteria mentioned in section 902(f)(2) are criteria for determining total disability due to pneumoconiosis.[41] This Court generally follows the principle of construction requiring the attribution of related meaning to statutory requirements grouped in a list. *Massachusetts v. Morash*, 109 S. Ct. at 1673. There is no reason to depart from the general rule here.

In the sections of the Act governing SSA's program, the exclusive focus on total disability or death due to pneumoconiosis is repeated over and over again. *See, e.g.*, 30 U.S.C. § 921(a) (directing the payment of benefits only on

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[41] Strictly construed, section 902(f)(2) does not require the Secretary of Labor to adopt criteria that are not more restrictive than SSA's for claims predicated upon an alleged death due to pneumoconiosis. While both SSA's and DOL's interim presumptions benefit a survivor whose claim is predicated upon an allegation of death due to the disease, neither section 902(f)(2) nor any other provision specifically requires DOL to follow SSA's pattern for this purpose. A natural reading of section 902(f)(2) limits the reach of the restrictivity prohibition to "total disability" criteria only. A survivor whose claim is predicated upon an allegation that the miner was totally disabled by pneumoconiosis at the time of death would, however, benefit from section 902(f)(2). *See* 30 U.S.C. §§ 901(a), 902(f)(1)(B).

account of total disability or death due to pneumoconiosis); *id.* § 922 (prescribing the amount of benefits payable on account of total disability or death due to pneumoconiosis). The Secretary of HEW did not in 1972, or at any other time have regulatory authority to write criteria providing benefits beyond the scope of these provisions. By the same token, there is no reason to assume that the Secretary actually did so.

Section 422 of the Act, 30 U.S.C. § 932, describes the rights and obligations of mine operators.[42] Of particular significance is paragraph (c) of this section which provides in relevant part:

> [N]o benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969, when it was operated by such operator.

Id. § 932(c). DOL's interim presumption rebuttal sections 727.203(b)(3) and (b)(4) are perfectly in accord with this statutory mandate, and there is no indication anywhere that it is overridden by the terms of section 902(f)(2). Although section 902(f)(2) was enacted after section 932(c), the provisions should and easily may be construed harmoniously. *See Morton v. Mancari*, 417 U.S. 535, 549-51 (1974).

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[42] Congress, throughout the history of the program, expected the states to fold the federal black lung provisions into their respective state workers' compensation laws. *See* 30 U.S.C. § 931. The Secretary of Labor is directed to exempt any state from the federal program if the state's workers' compensation law provides adequate coverage for total disability or death due to pneumoconiosis. *Id.* § 931(b)(2)(A). If Congress intended to require the payment of benefits in many cases even if the record proved the absence of pneumoconiosis or related disability or death, no state could even theoretically comply, and the enactment of the section would have been pointless.

It is also significant that the Act requires the adjudicator to give due consideration to all relevant evidence:

> In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history. . . .

30 U.S.C. § 923(b).[43] This Court has held that the mandate of section 923(b) is satisfied "[a]s long as relevant evidence will be considered at some point by the ALJ . . . ." *Mullins Coal Co.*, 484 U.S. at 150. Invocation of either the SSA or DOL interim presumption may be accomplished after consideration of only one of the types of relevant evidence listed.[44] The rest of the relevant evidence is relevant, generally, only in the rebuttal inquiry. In the case of PFTs and ABG studies, relevance may differ depending upon whether the study results are being used to invoke the presumption or rebut it.[45] The leftover evidence may be highly relevant for determining whether the miner has pneumoconiosis, is disabled due to the disease, or died due to the disease. If the Fourth Circuit is correct in its conclusion that rebuttal is unavailable in light of proof that the miner does not suffer from pneumoconiosis or related

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[43] While this provision appears within Part B, it was a part of 1972 amendments to the Act that must also apply in Part C claims. 30 U.S.C. § 940.

[44] In a case decided under SSA's rule, other parts of the record may also be relevant in the pre-invocation phase (*e.g.*, proof of disease causation). 20 C.F.R. § 410.490(b)(2), (3). Even under the SSA rule, however, there will always be additional elements of the entitlement inquiry that are not resolved at the point of invocation (*e.g.*, disability causation).

[45] In the invocation phase, the studies are reviewed only to determine whether published invocation values are met. 20 C.F.R. §§ 410.490(b)(1)(ii); 727.203(a)(2), (3). In the rebuttal phase, the studies assist the reporting physicians in determining whether, in fact, the miner is or was totally disabled due to pneumoconiosis.

disability, much of the specific types of evidence that Congress directed black lung adjudicators to consider may not be considered at all.

As a matter of statutory interpretation, the word "criteria" in section 902(f)(2) may not be divorced from the Act as a whole. There is no rule of construction that permits the word to be treated as the equivalent of a computer virus that countermands all other instructions bringing disorder where an orderly pattern was intended.[46] The Act affirmatively obligates mine operators to pay benefits only on account of total disability or death due to an occupational disease that was caused in part by the miner's employment with the operator. If, for good reason, Congress deems it appropriate to reallocate traditional burdens of proof to make it easier for a claimant to obtain benefits, it is certainly appropriate for Congress to design the entitlement scheme with this objective in mind. It does not follow, however, that any interpretation of the statute benefitting claimants is proper. *See Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 282 & n.24 (1980).

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[46] It is noted in *Pittston Coal Group*, "that Congress had no particular motive in preserving the HEW interim medical criteria other than to assure the continued liberality of black lung awards. . . . [T]here is no apparent reason for giving the unqualified word 'criteria' the unnaturally limited meaning the Secretary suggests." 488 U.S. at 116. This reasoning cannot also sustain the Fourth Circuit's invalidation of DOL's rebuttal rules. The meaning reflected in DOL's rebuttal rules is derived expressly and precisely from the Act. The Act sets the limits and those limits are essential to the viability and rationality of the program. Liberality alone, and that is virtually all there is to support invalidation of 20 C.F.R. § 727.203(b)(3) and (4), cannot carry this case by itself and leads to the unnatural result. *See Morrison-Knudsen Const. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 635-36 (1983) (workers' compensation laws reflect a legislatively settled compromise between the employer and employee, and the remedial purposes of such laws do not substitute for traditional methods of interpretation).

"Statutes should be interpreted to avoid untenable distinctions and unreasonable results wherever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). This is a proper rule to apply here. The Fourth Circuit's belief that a mine operator cannot defend any black lung disability claim by proving that the miner does not have the disease or related disability is not reasonable and has no support whatever in the statute. The Secretary of Labor was compelled by the Act to permit rebuttal of the presumption written to comply with section 902(f)(2), if it is proven that the miner does not suffer from black lung disease or related disability.

The legislative history of the 1977 amendments adds little to the discussion. It serves mainly to explain the general absence of reported SSA rebuttal litigation and to express Congress's intent that DOL properly validate claims, a job that was not accomplished by SSA. There is no statement or recognition in the extensive legislative record to confirm the Fourth Circuit's conclusion that SSA's interim presumption could not be rebutted by the third and fourth methods prescribed in DOL's rule. There is no statement that rebuttal by these methods was, or should have been, precluded. There is no indication that DOL was expected to eliminate disease or disability causation as elements in any case.[47]

The legislative record shows that SSA made little or no effort to litigate questionable claims and did not assume an adversary's role. *See supra* 12. There is no indication that SSA precluded itself in its rules from meaningfully contesting claims, only that the agency made the choice,

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[47] Several bills considered but rejected the adoption of irrebuttable presumptions or entitlements solely on the basis of many years of coal mine employment. *See, e.g.*, H.R. 7, 94th Cong., 1st Sess. § 3(a) (1975); H.R. 10760, 94th Cong., 1st Sess. § 2(a) (1975). These proposals did not contemplate direct mine operator involvement in the adjudication or payment of claims.

for whatever reason, not to do so. The record also clearly expresses Congress's expectation that DOL, in the design of its interim presumption, and otherwise, would do a better job. In this regard, the Conference Committee ordered DOL to write an interim presumption and design a system of adjudication in which "all relevant medical evidence shall be considered." H.R. Rep. No. 864, *supra* p. 13, at 16. DOL surely could not achieve this objective if it wrote an interim presumption mandating indifference to medical evidence proving that the miner did not even have black lung disease. There is, in sum, nothing in the record to undercut the validity of DOL's rebuttal rules and some strong indications that DOL regulated as was expected.

III.

DOL'S REBUTTAL RULES DESERVE JUDICIAL DEFERENCE

The Secretary of Labor is authorized by the Act to write regulations, including interim criteria, for the adjudication of all DOL claims. 30 U.S.C. § 902(f)(1), (2), 932(b), 936(a). DOL's regulations erect the required presumptions and, in simple, logical fashion, permit the rebuttal of the facts that are presumed. In so doing, the Secretary's rules require the denial of a claim if it is proven that the miner does not or did not have pneumoconiosis or is not disabled or did not die due to this disease. These rules reflect the Secretary's understanding of his statutory mission.

This Court's standard of review of the validity of the agency's interpretation of a statute it administers is now fairly well established:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction .... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1987) (footnotes omitted).

In the Black Lung Benefits Act, Congress has spoken fairly clearly. The Act precludes the assignment of liability to a mine operator absent a connection between employment, disease and related disability or death. 30 U.S.C. § 932(c). Congress also stated that "total disability" in this law means total disability due to pneumoconiosis, *id.* § 902(f)(1)(A), and that all the elements in the entitlement inquiry must be reviewed in light of all relevant evidence, *id.* § 923(b). DOL's rebuttal rules are, by all appearances, perfectly consistent with the words of the Act. The word "criteria" in section 902(f)(2) does not carry enough force to change this conclusion. At very best, it leads the reader to the intricacies of section 410.490, which easily submit to a reading that is fully consistent with the terms of sections 727.203(b)(3) and (b)(4). *See supra* pp. 25-31. At its worst, section 410.490 presents an unfortunately ambiguous and poorly designed set of criteria defying any precise analysis.

In the end, however, the Secretary of Labor's election to construe SSA's criteria so that they are fully consistent with the plain language of the Act cannot be persuasively faulted and plainly deserves judicial deference.[48]

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[48] Traditional deference makeweights are all present. DOL's rebuttal

IV.

30 U.S.C. § 902(f)(2) VIOLATES THE DUE PROCESS RIGHTS OF MINE OPERATORS IF IT COMPELS LIABILITY FOR DISABILITY OR DEATH IN WHICH THE MINE OPERATOR IS NOT INVOLVED

This Court does not often or readily find fault with economic regulatory legislation in light of the Due Process Clause. A reasonable interpretation of 30 U.S.C. § 902(f)(2) avoids the need to determine whether it is among the rare exceptions to the rule. If, however, section 902(f)(2) is construed to impose mandatory black lung liability on a mine operator for disease, disability, or death that is demonstrably unrelated to the miner's employment with the operator, a legitimate due process question is presented.[49]

rules have been in place since 1978, and were not directly challenged in litigation until after the decision in *Pittston Coal Group*. DOL's rules were promulgated shortly after enactment of 30 U.S.C. § 902(f)(2) as part of the 1977 amendments, and DOL personnel were very much involved in the evolution and drafting of the amendments.

[49] In responding to the petitions for certiorari, both Taylor and Dayton argued that the due process concern raised here was not properly raised in the Fourth Circuit. This is incorrect. Taylor's original petitioner's brief to the Fourth Circuit did not raise the section 410.490 issue. The matter was later raised in a perfunctory way in Taylor's Supplemental Brief. After the Fourth Circuit adopted the theory of the Supplemental Brief, Clinchfield's petition for rehearing squarely challenged the constitutionality of the Fourth Circuit's interpretation. Respondent's Petition for Rehearing at 12-14, *Taylor v. Clinchfield Coal Co., supra*. The Government directly raised the question in *Dayton*, and notwithstanding the Fourth Circuit's refusal to consider a constitutional question raised by the Government, there is no apparent authority prohibiting the Government from doing so. The Government as administrator of a program would not, it seems, be in the same position as a private party seeking to assert the constitutional rights of others. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). In the setting presented, DOL has a legitimate recognizable interest in preserving the fairness and integrity of a program it administers. *See* 30 U.S.C. § 932(k). The writs of certiorari granted in these two cases are not limited and both petitions for certiorari seek direct review of the constitutional validity of 30 U.S.C. § 902(f)(2), as a final resort.

The longstanding test for determining the validity of civil presumptions under the Due Process Clause is clearly articulated. For the presumption to pass constitutional muster,

> "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

Usery v. Turner Elkhorn Mining Co., 428 U.S. at 28 (quoting *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)). If the evidentiary device merely shifts the traditional burden of proving certain facts from one party to another, it is fairly certain that the legislature's election to do so will pass the test in a civil law setting.

Where, however, the device also "curtails the factfinder's freedom to assess the evidence independently," some reasonable basis for precluding inquiry into the truth is required. *See County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156 (1979). The requisite rational basis might be found in the strength of the connection between elemental and ultimate facts, *id.*, or it might be apparent if the operation and effect of the statute is clearly within the bounds of reason. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 22-26. Section 902(f)(2) as read by the court below reveals neither a strong connection between proven facts and the mandatory conclusions suggested nor a permissible operation and effect.

No matter how easy it may be to satisfy the requirements of the Due Process Clause, the Fourth Circuit's interpretation of 30 U.S.C. § 902(f)(2) is very troubling. This Court has already noted:

> [O]nly the first of the four alternative methods of invoking the [DOL] presumption requires proof

> that the claimant's disease is in fact pneumoconiosis. None of the methods requires proof of causation, and only the fourth requires proof of total disability.

Mullins Coal Co., 484 U.S. at 143. It is clear that abnormal chest x-rays may not detect occupationally related disease.[50] PFTs are not diagnostic of occupational disease, and the levels set for invocation are designed specifically to give the benefit of presumptive entitlement to reasonably healthy, older miners.[51] Blood gas test results are also not diagnostic, and abnormal results may be due to a wide variety of temporary or permanent illnesses, the altitude of the test facility, and even the personal habits of the person being tested.[52] A credible and well documented medical opinion establishing a totally disabling respiratory impairment may identify a condition with no relationship whatever to coal mining.

In no instance is the connection between invocation facts and presumed ultimate facts very strong and most often there is no scientifically verifiable connection at all.[53] If the operator is required to pay benefits solely on the basis

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[50] *See supra* note 31. This Court has also noted, "Simple pneumoconiosis [the level of disease present in the vast majority of cases in which the x-rays are positive, including Mr. Pauley's case] . . . is generally regarded by physicians as seldom productive of significant respiratory impairment." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 7.

[51] *See supra* note 19.

[52] *See supra* note 20.

[53] The statutory irrebuttable presumption reviewed in *Usery v. Turner Elkhorn* is a very different matter. *See* 30 U.S.C. § 921(c)(3). This presumption is available only if the proof demonstrates "complicated" pneumoconiosis, the most severe and advanced stage of the disease. *Usery*, 428 U.S. at 7-8. But even in this connection, the Court was wary of the retroactive application of the presumption where, for example, the miner died from an unrelated condition and was unaffected by his disease. *Id.* at 26.

of PFTs or blood gases meeting the tables, and is deprived of a meaningful right to put on any relevant proof showing that it has not caused the disease, disability or death of the miner, the result is quite likely to be purely arbitrary. The result mandated by the court below in Taylor's and Dayton's cases is purely arbitrary.

Clinchfield caused no harm to Taylor and Consol caused none to Dayton. It is purely arbitrary to make the mine operator the insurer of last resort for Taylor's obesity and cigarette smoking, Dayton's cigarette smoking and his decision to leave coal mining, or for that matter, Mr. Pauley's arthritis and stroke. The constitutional concern "lurking beneath the surface" in *Mullins Coal Co.*, 484 U.S. at 159 n.32, rises to surface in this setting. It is no different, as a practical matter, to prohibit the operator from proving that the miner does not have pneumoconiosis or related disability in the rebuttal phase, than it is to preclude the mine operator from challenging the reading of an x-ray in the invocation phase. In either case, the opportunity to defend is severely damaged or lost entirely, the truth becomes irrelevant, and our system of justice is poorly served. *See Developments in the Law: Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1643 (1986).

If the Due Process Clause has any meaning in a substantive civil context where economic rights are at stake, that meaning should restrain Congress from directly redistributing the property of one party to another without any valid reason. Perhaps an employment relationship, even a fairly short one, may be enough of a reason and it does not matter whether the redistribution is called black lung benefits or something else. It is suggested, however, that when Congress writes a law to provide black lung benefits to be paid by employers, it is not constitutionally good enough to design the law to disguise a vastly larger objective[54] that can only be achieved by denying the

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[54] Information obtained indirectly from DOL indicates that the number

defendant any reasonable opportunity to defend. In the Black Lung Benefits Act, Congress did not write a life insurance, general disability insurance, general health insurance, retirement or unemployment program for coal miners and their families. Mine operators did not and had no reason to fund any such program. Congress should not be able to realize its hidden agenda, if it had one, consistent with constitutional principles, by effectively depriving the operators of their day in court.

These cases bring this Court face-to-face with a truly arbitrary mandate. The mine operators have been ordered, by virtue of 30 U.S.C. § 902(f)(2), to pay black lung compensation to two former employees who have not been harmed at all as a result of their employment. The holding is generic and will affect thousands of cases. This result is surely not in keeping with the language, spirit or purpose of the Due Process Clause.

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of claims potentially affected by this case range from 3,000 to 7,000. The Solicitor General anticipates a volume toward the lower end of this range. With indemnity benefits, health care costs and interest on past due liabilities, the cost of these claims could easily top $1 billion. Most of this liability was unanticipated and is unfunded under current arrangements.

CONCLUSION

The judgments of the Fourth Circuit should be reversed. The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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